



Decyzji w sprawie 178/2014/AN - Wykluczenie z publicznej procedury przetargowej na roboty budowlane w Bośni i Hercegowinie

Decyzja

Sprawa 178/2014/AN - Otwarta 06/02/2014 - Decyzja z 23/10/2014 - Instytucja, której sprawa dotyczy Europejski Bank Inwestycyjny (Uwaga krytyczna) |

Sprawa dotyczyła decyzji Europejskiego Banku Inwestycyjnego zatwierdzającej wykluczenie skarżącego (włoskiej spółki Impresa Pizzarotti & C. SpA) z finansowanej przez siebie publicznej procedury przetargowej na terenie Bośni i Hercegowiny. Skarżący został wykluczony ze względu na rzekomą niezgodność oferty ze specyfikacjami technicznymi. Skarżący skorzystał z mechanizmu rozpatrywania skarg EBI, w ramach którego rozstrzygnięto na korzyść skarżącego, uznając jego wykluczenie za bezprawne. Kierownictwo EBI odrzuciło jednak ustalenia własnego mechanizmu rozpatrywania skarg, zatwierdzając decyzję o wykluczeniu skarżącego z procedury przetargowej.

Dochodzenie Rzecznika w sprawie wykazało przypadek niewłaściwego administrowania w związku z faktem, że decyzja EBI oparta została na błędzie prawnym. Ponieważ jednak zamówienie zostało już przyznane innemu oferentowi, a roboty budowlane już się rozpoczęły, żadne rozwiązanie nie było możliwe. Wobec powyższego Rzecznik zamknął sprawę uwagą krytyczną. Ponadto Rzecznik wyraził obawę, że obecny przypadek niewłaściwego administrowania ze strony Banku może podważyć przyjęte przez Unię Europejską zobowiązanie do wzmocnienia praworządności w Bośni i Hercegowinie. Rzecznik zapowiedział, że rozważy wszczęcie dochodzenia z własnej inicjatywy w kwestii systemowych aspektów postępowania EBI w przedmiotowej sprawie.

The background to the complaint

1. The European Investment Bank ('EIB') is the long-term lending institution of the European Union. The EIB's remit is to further the objectives of the European Union by making long-term finance available for sound investment. Within the EIB, the Complaints Mechanism was created in order to facilitate and handle complaints against the EIB by individuals, organisations or corporations affected by EIB activities. A Memorandum of Understanding between the European Ombudsman and the EIB [1] explains how the former takes account of the work of the Complaints Mechanism. The Complaints Mechanism is independent of the EIB services which are responsible for the activities challenged by the complainant. Complainants who are still dissatisfied after availing of the Complaints Mechanism may escalate the complaint to the European Ombudsman.

2. In 2012, the complainant, the Italian company Impresa Pizzarotti & C. SpA, participated in



a tender for the construction of a viaduct in Bosnia and Herzegovina (BiH), which was financed by the EIB. Despite submitting the lowest bid, the complainant was excluded by the BiH promoter on the grounds that its bid did not match the tender specifications.

3. The complainant challenged this decision with the promoter, which maintained its view. Local law excluded any remedy in the local courts in relation to tenders of this kind. The complainant turned to the EIB Complaints Mechanism, which found, following an investigation, that the complainant was right. The Complaints Mechanism recommended that the EIB withdraw its approval (the "non-objection") for the awarding of the contract to another bidder. The EIB, however, endorsed the promoter's position and maintained its non-objection.

The inquiry

4. On 6 February 2014, the Ombudsman opened an inquiry into the complaint on the basis of an allegation that the EIB wrongly failed to review its non-objection in the case at hand, and claim that the EIB should review the non-objection and suspend the funding of the project.

5. In the course of the inquiry, the Ombudsman received the opinion of the EIB on the complaint and, subsequently, the comments of the complainant in response to that opinion. Her services also carried out an inspection of the EIB's file on the matter. The present decision takes into account the arguments and opinions put forward by the parties. Allegation of wrong maintenance of the non-objection and related claim

Arguments presented to the Ombudsman

6. The EIB endorsed, in substance, the BiH promoter's view that the construction methodology proposed by the complainant in its bid was different from the one required by the tender documentation, which did not allow for any deviations.

7. The EIB also considered that the construction methodology proposed by the complainant would have implied significant additional time, not only to carry out a re-design, but also to obtain a new set of administrative permits from BiH authorities. The BiH promoter's decision to exclude the complainant's bid, on the basis that it did not meet the requirements of the tender documentation, was supported by three external experts commissioned by the promoter. Moreover, the EIB commissioned a fourth international expert to review the case who agreed with the latter's view. In addition, the EIB's own technical services also concluded that the complainant's bid did not meet the tender requirements.

8. One of the external experts also observed that the tender documentation was clear and unambiguous. In particular, the EIB considered that the required construction methodology was expressed in sufficiently clear and precise manner so as to enable a reasonably experienced civil engineer to understand what exactly was required. This is obvious, according to the EIB, from the absence, during the clarification procedure, of any question from the tenderers in relation to the construction methodology, and from the fact that all the other tenderers submitted bids based on the correct construction methodology.



9. In light of the Complaints Mechanism's recommendation to re-examine the non-objection, the EIB services re-examined the case and reaffirmed the initial non-objection. The EIB thus maintained its decision.

10. The complainant, on its side, believed that the tender documentation did not require a particular construction methodology, and therefore its proposed methodology could not be considered as deviating from the tender specifications. This view was also endorsed by the Complaints Mechanism. The complainant said repeatedly that its exclusion from the tender not only caused it significant economic damage, but also led the EIB to finance a bid which was 11% more expensive, entailing extra-spending of about 18 million euros.

The Ombudsman's assessment

11. The parties' diverging positions in this case include technical arguments related to civil engineering questions. It is neither appropriate nor necessary for the Ombudsman to take a position in relation to these matters, because the core issue turns on the legal meaning of the tender documents, in particular the provisions concerning the degree of technical freedom left to the bidders in preparing their offers.

12. The legal issue that lies at the heart of the dispute is whether **the tender specifications clearly and unambiguously required a particular construction methodology**, as the EIB claimed, or whether they left room for other methodologies, as the complainant and the Complaints Mechanism believed.

13. The tender documentation examined by the Ombudsman services consists of a set of documents, some written ('the written part'), some consisting of drawings (the 'Drawings') and, finally, some containing financial information (the 'Bill of Quantities'). The tender documentation was accompanied by Guidelines for road design, construction, maintenance and supervision, and bridge design ('the Guidelines').

14. Having inspected the EIB's complete file in relation to the tender, the Ombudsman shares the view of the complainant and of the Complaints Mechanism that the tender documentation does not state clearly and unambiguously which construction methodology should be used. There is nothing in that regard in the written part. Moreover, as the EIB acknowledged in its opinion, the Drawings provided to the tenderers referred to "main design", with no mention whatsoever that such main design was final. On the contrary, section 1.1.2 of the Bill of Quantities contains an item meant to cover the estimated cost for modification of the main design, which shows that the latter was not viewed as immutable in the tender documentation.

15. In addition to the above, it must be noted that Section 13 of the Guidelines, which refers specifically to bridge construction methods, lists and elaborates on the possible construction methods, including the one proposed by the complainant. Although the Guidelines do not form part of the tender specifications, they did accompany the tender documents and were meant to assist the tenderers in their technical choices. Given that the tender documents did



not clearly require a specific construction methodology, the fact that the Guidelines referred to several methodologies reasonably allowed the complainant, and any other tenderer, to conclude that none of them was ruled out.

16. The Ombudsman accepts the EIB's position that the BiH promoter's intention was to award the contract to a contractor using a specific construction methodology, which was different from the one proposed by the complainant. Furthermore, the Ombudsman has no reason to doubt that the methodology in question could reasonably be considered, for a number of reasons, to be the most appropriate in the given circumstances. However, these are not the relevant issues. Tenderers taking part in a public bid process financed by an EU institution need to be able to ascertain what is required from them and to what extent they may deviate from the established requirements, or make proposals which lead to the same result by different means. In the present case, whatever the underlying intentions of the promoter may have been, they were not expressed with sufficient clarity in the tender documents as to rule out the complainant's interpretation.

17. In this regard, it is irrelevant that, as the EIB mentioned, there were no questions for clarification and that the complainant was the only bidder to interpret the tender specifications in a way that was not the intended one. There may be numerous reasons for this, for instance that no other tenderer had access to the necessary technology to propose the same construction method as the complainant, or that other bidders simply read the tender documentation in a different way. The issue remains that **the tender specifications allowed for the complainant's interpretation, and thus prevented the promoter from disqualifying the complainant on the ground that the latter interpreted the relevant rules in a way which differed from the one the promoter preferred.**

18. In addition to the above, the Ombudsman cannot accept the EIB's argument that the complainant's bid was also non-compliant because its proposed construction methodology would have delayed the execution of the project, since it required new construction permits to be issued. While the Ombudsman fully understands the economic rationale behind the project being implemented as soon as possible, she nevertheless points out that, unless specified in the tender documentation, such a rationale cannot lead to the exclusion of a tenderer.

19. Had the EIB or the promoter intended to make the rapid implementation of the project an essential requirement, this should have been explicitly mentioned in the tender documentation. Instead, Part 1 of Section IV of the tender documents merely mentions that the tenderer should "*demonstrate the ability to complete all works within 20 months*". As the Complaints Mechanism rightly pointed out, the duration of the works to be performed by the contractor should not include the time that the promoter needs to obtain the construction permits. In addition to that, the complainant did specify, in its bid, that the method it proposed would allow it to perform the works within that timeframe.

20. It follows that **the EIB's decision to maintain its non-objection to the exclusion of the complainant's tender was based on a legally incorrect reading of the tender documents. This was an instance of maladministration.**



21. The maladministration is particularly serious because, as the OECD has recognised, getting procurement procedures right is a key instrument in fighting corruption in the public sector. According to the OECD, procurement is the government activity most vulnerable to waste, fraud and corruption due to the size of the financial flows involved. Integrity in public procurement is essential in maintaining citizens' trust in government [2] .

22. Furthermore, it is in the interests of the EIB's good reputation as a major provider of EU funding and as a respectable EU institution in the eyes of third country authorities, promoters and contractors that participants in tenders financed from EIB loans in third countries should have access to a fully operational internal redress mechanism within the EIB. This is particularly important where the EIB is involved in countries which have underdeveloped or ineffective systems for the administration of justice.

23 . In this context, the Ombudsman notes the following statement contained in the European Commission's 2013 Progress Report on Bosnia and Herzegovina (COM(2013) 700 final): *No substantial improvements can be reported as regards the legal system in Bosnia and Herzegovina, which remains complex and challenging. The standard of legislation is relatively high in some areas; nevertheless the practical implementation of laws is often poor due to the weak enforcement capacity of key institutions. The judicial system often does not function efficiently and does not cover commercial activities adequately. Enforcement of commercial contracts remains a lengthy process, which involves 37 procedures and takes an average of 595 days, unchanged from the previous year. Overall, a weak rule of law, corruption, and unreliable contract enforcement continue to hamper the business environment* [3] .

24 . Against this background, the approach taken by the EIB in this case is wholly unacceptable. It risks putting into question not only the EIB's own reputation but also the Union's commitment to strengthening the rule of law in Bosnia and Herzegovina. This reputational damage could have been avoided if the EIB had followed the advice of its own internal Complaints Mechanism.

25. Article 3(5) of the European Ombudsman's Statute provides that, when an instance of maladministration is identified, the Ombudsman shall as far as possible seek a solution with the institution concerned to eliminate the maladministration. In the present case, the serious nature of the maladministration and its potential systemic implications are such that it would be inappropriate to seek such a solution. In any event, in this case no solution is possible now, given that the construction project was awarded to another bidder and the construction began several months ago. The complainant in this case has not sought to be compensated for the costs of preparing a tender application which, because of an illegality, was excluded from the tender process. Accordingly, the Ombudsman will not recommend financial compensation for those costs. Consequently, the Ombudsman will close the inquiry with a critical remark and will also send a copy of this decision to the Presidents of the European Parliament, the Council of the European Union and the European Commission, for information.

26. The Ombudsman trusts that the Bank will follow up the critical remark by learning



appropriate lessons from this case for the future. She will also consider opening an own-initiative inquiry into the systemic issues raised by the case.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The EIB's decision to maintain its non-objection to the exclusion of the complainant's tender was based on a legally incorrect reading of the tender documents. This was an instance of maladministration.

The EIB's activities affect the reputation of the European Union and should be consistent with the Union's values and principles. The EIB's maladministration in this case risks putting into question not only the EIB's own reputation but also the Union's commitment to strengthening the rule of law in Bosnia and Herzegovina. This reputational damage could have been avoided if the EIB had followed the advice of its own internal Complaints Mechanism.

The complainant and the EIB will be informed of this decision. The Ombudsman will also send a copy of her decision to the Presidents of the European Parliament, the European Commission and the Council of the European Union, for information.

Emily O'Reilly

Done in Strasbourg on 23 October 2014

[1] Available at: <http://www.ombudsman.europa.eu/cooperation/en/20080709-1.htm>

[2] See <http://www.oecd.org/corruption/ethics/integrityinpublicprocurement.htm>

[3]

http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013_en.pdf
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